



DPS Legal Review

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K-9 Bite

The plaintiff was travelling in a car that stopped to assist another car with a flat tire. Someone discharged a firearm into the air which brought the City of Orlando Police Department (including an officer with his police K-9) to the scene. The officers approached the two cars and ordered everyone in the cars to lie down on the sidewalk, and the plaintiff immediately complied.

While another passenger was moving from the area near the car with the flat tire to the area near the other car to lie down on the sidewalk, the K-9 officer instructed the dog to "bite" or "apprehend." The plaintiff alleged injury from the K-9 attack. The plaintiff sued alleging a violation of the Fourteenth Amendment.

HOLDING: The Court held that the Defendant was "seized" based upon the Fourth Amendment at the time of the attack because he was lying down prone on the sidewalk based upon the police officer's orders. However, the Court dismissed the case based upon qualified immunity since there is no clearly established law that the officer's alleged actions violated the plaintiff's Fourteenth Amendment right to protection from physical harm while in state custody. Forrester v. Stanley, 2010 WL 1257471 (M.D. Fla.).

UNLAWFUL SEARCH

Two officers on bicycle patrol approached a car. A female was leaning into the driver's side window, and a male (the defendant) was sitting in the passenger seat. *Neither officer observed the violation of any laws.* They spoke briefly to the female without incident. Then, the officer on the driver's side saw the defendant remove a Crown Royal bag from the cup-holder and hold it in his hand. The defendant started to leave the car, but he could not because of the presence of the second officer on the passenger's side. He replaced the bag in the cup-holder.

One officer asked the defendant several times what was in the bag. The defendant

declined to answer. The defendant also attempted to place a pizza box over the bag. The officer leaned into the vehicle and opened the bag to see its contents, which appeared to be cocaine. The officer seized the bag and charged the defendant with possession of cocaine with intent to distribute, possession of ecstasy, and possession of marijuana. The defendant moved to suppress the evidence.

HOLDING: The Court held that the contents of the bag should be suppressed. The officers' initial approach fell within the realm of the first type of police-citizen encounter which requires no reasonable suspicion of criminal activity. At that point, the Court held the defendant was free to refuse to answer or ignore the request of the officer and go on his way. Once the officer prevented the defendant from exercising this right and exit the vehicle, the encounter escalated to a second-tier encounter.

The Court held that the defendant had done nothing to give rise to a particularized and objective basis for suspecting that he was involved in criminal activity. The Court held that the State's attempt to justify the search of the bag as a search for a weapon based upon officer safety lacked merit because a limited search for officer safety only arises during a legally justified second-tier encounter. State v. Jones, ___S.E.2d___, 2010 WL 1240777 (Ga. App.).

UNLAWFUL SEARCH

A Georgia State Trooper stopped the defendant for a suspected window tint violation. After using a window tint meter to confirm the violation, the trooper issued a warning rather than a citation. The trooper sensed there was a problem because the defendant was sweating profusely and seemed nervous. The defendant's responses to general questions about his route that day conflicted with his passenger's responses. The trooper told the defendant that he planned to give him a warning, and he went back to his patrol car where he called for backup.

A K-9 handler responded to the call for backup and arrived before the trooper finished the warning. Eight minutes after stopping the defendant, the trooper gave him the written warning, his driver's license, and insurance card and told him he was free to go. The trooper also asked the defendant if he had any drugs or other illegal contraband in his car. The trooper asked for permission to search the car. The defendant responded, "I guess." The trooper advised the defendant that he had the right to refuse the search of his vehicle. The defendant said, "Y'all are going to search it whether I say yes or no," and then he signed the voluntary consent to search form. The trooper removed the keys from the ignition, and the K-9 handler took the drug detection dog to the car. The dog signaled that it detected contraband. The trooper found four pounds of marijuana in the car. The defendant moved to suppress the evidence alleging an illegal detention.

HOLDING: The Court held that in order to be constitutional, a traffic stop cannot be unreasonably prolonged beyond the time required to conduct and fulfill the purpose of the stop. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver's license, insurance, and registration, to complete any paperwork connected with the citation or a written warning, and to run a computer check for any outstanding arrest warrants for the driver or the passengers. The Court held that, considering the totality of the circumstances, the trooper's request to search did not unreasonably prolong the defendant's detention. It was undisputed that the trooper asked the defendant for his consent to search the car immediately after giving him his documents and his warning ticket. Davis v. State, __S.E.2d__, 2010 WL 12423914 (Ga. App.).

CONSTRUCTIVE POSSESSION

A law enforcement officer noticed a car parked at one end of a store parking lot with one person in the driver's seat and another in the back seat. Then, a car driven by the defendant, a minor, pulled into the lot beside the first car. The defendant got out of his car and into the front passenger seat of the first car. The officer saw nothing in the defendant's hand as he exited his car and got into the other car. When the officer approached the car, the defendant said he had come from another county to collect money from a friend and just stopped by to talk to the other driver. The driver of the first car consented to a search. The officer discovered a bag of cocaine

in the car's closed center console. The officer did not see the defendant in physical possession of the cocaine, and the defendant had only been in the car for two or three minutes when the officer approached. The defendant denied possessing or knowing about the cocaine. No drugs or drug paraphernalia were found on the defendant.

HOLDING: The Court held that evidence that the defendant moved his hand in the area of the closed center console did not satisfy the state's burden of excluding every reasonable hypothesis other than that he intended to exercise dominion or control over the contraband. The Court held this evidence was insufficient to show the defendant had constructive possession of the cocaine. In the interest of J.S., a child, __S.E.2d__, 2010 WL 1509592 (Ga. App.).

INQUIRING MINDS

QUERY: An O.C.G.A. § 40-6-392(b) subject gives two breath samples, and one sample is beyond tolerance. Can you request another sample?

ANSWER: Yes. According to the Intoxilyzer 5000 training manual, when the results exceed the allowed parameters, you should wait twenty minutes and then retest the person. The two breath samples cannot vary by more than 0.020 grams. If the difference is 0.020 grams or less, then you have a good test. If the test results do exceed the parameters then the intox instrument should print outside required parameter on the breath test result card.

ALS REMINDERS

☉ Remember that the number of clues that are being checked on each of the Standardized Field Sobriety Tests are: 1) six clues on the horizontal gaze nystagmus, 2) eight clues on the walk and turn, and 3) four clues on the one leg stand.

☉ If an additional witness is involved in the case, please remember to include **all** of the contact information (such as the name, agency, address, phone number, fax number, etc.) for every witness in the incident report.

QUOTABLE WISDOM WORKS

"If you worry about who is going to get credit, you don't get much work done."

~Dorothy Height

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